Q&A

I am working in a factory owned by a private company. The company has a set of certified standing orders which are applicable to all the workers in the factory. At the time of my appointment the company had made me sign an employment contract according to which the company can change my department and transfer me anywhere in India. However, the certified standing orders do not allow the company from transferring me to any other department. Please let me know whether the company can transfer me to another department or not.

Please note that under the Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act") the certified standing orders have statutory force. The standing order implies a contract between the employer and the workman. Therefore, the employer and the workman cannot enter into a contract overriding the statutory contract as embodied in the certified standing orders unless the same is done by way of modification in the standing order as stipulated in the Standing Orders Act. Further, please note that while the standing orders are in force, if there is any conflict between your employment contract and certified standing orders, the certified standing orders will prevail.

In this regard, reference may be made to the judgment of the Supreme Court in Western India Match Co. vs. Workmen (AIR 1973 SC 2650) wherein the court held that the terms of employment specified in the standing order would prevail over the corresponding terms in the contract of service in existence on the enforcement of the standing order. In view of the aforesaid, kindly note that your company cannot change your department unless the standing orders allow the company to do the same.

The company with which I am working has not paid salary to me and to some of my colleagues from the past 4 months because of business losses. However, the company has promised to clear all the dues by next month. Further, we are also expected to work at the office despite non-payment of salary. Please let me know if I resign now, will I lose my salary dues. Further, also advise any action which can be taken against the company in the event the company fails to pay the dues?

Given that you have not received your salary for the past four months, you may make an application to the Competent Authority under Section 15 of the Payment of Wages Act, 1936 ("PWA") for the delay in payment of your wages. In this regard, kindly note that Section 16 of the PWA provides that a single application may be presented under Section 15 on behalf of any number of employed persons belonging to the same unpaid group.

Employees under Section 16 are said to belong to the same unpaid group if their wages have remained unpaid for the same wage period. Since you and as well as your colleagues have not been paid for the same wage-period, a single application on behalf of all of you would suffice.

Please note that the application should be presented within twelve (12) months from the date on which the payment of wages was due to be made. In addition to the wages, you and your colleagues may also be entitled to compensation.

Additionally, also note that even if you resign now, the company has no right to withhold the salary due to you for the period for which you actually worked for the company and the same shall be payable to you.

I used to work as a part time employee in a company. Recently, my employer terminated services of some regular employees as well as part time employees on account surplus work force. However, the retrenchment compensation was only paid to the regular employers. Can you let me know whether part time workers are entitled to

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retrenchment compensation?
Please note that there is no explicit inclusion of part time workers under the Industrial Disputes Act, 1947 ("Dispute Act"). A closer analysis of the definition of 'workman' and 'continuous service' under the Disputes Act would reveal that there is no mention of the number of working hours per day as a qualifying criterion to fall under either of the respective definitions. Perhaps one of the most important judicial precedent leading to a determining decision on this point is the case of Divisional Manager, New India Assurance Co. Ltd. v. A. Sankaralinga; AIR 2009 SC 309. In the said case the Madras High Court relied on the definitions of 'workman' and 'continuous service' under Section 2(s) and Section 25B of the Act respectively to hold that these two definitions were not restricted in applicability to only full time employees as the all embracing tenor of the definition took within its ambit part time employees as well. Accordingly, the award of the Industrial Tribunal was quashed and reinstatement of the workman with full back wages was ordered leaving the matter of regularization of service to be considered by the employer in accordance with law. This judgment was further confirmed in appeal by the Division Bench of the High Court. Subsequently, the Hon'ble Supreme Court of India upheld the judgment of Madras High Court and concluded that a workman working even on a part time basis would be entitled to the benefit of Section 25-F of the Dispute Act.

Fixed term employment Contracts in India

In any industry there may arise a situation where it becomes necessary for the employers to reduce the surplus work force due to the deteriorating profit margins, shortage of raw materials, accumulation of stocks, break-down of machinery etc. The reduction in work force is generally in the form of retrenchment. However, in order to protect workers against dismissals in the garb of retrenchment due process and conditions have been laid down under the Industrial Dispute Act, 1947 ("Act"). Further, the Act prohibits retrenchment of worker who has been in continuous service of one year unless the employer pays retrenchment compensation as well as fulfills other obligations stipulated in the Act.

However, the said protection granted to the workmen made it difficult for the seasonal industries or other industries which are involved in fixed term projects to hire employees for a specific duration for a particular season or project. Therefore, the legislature keeping aforesaid aspect in mind amended the Act in 1984 by introducing Sub-clause (bb) under Section 2(oo) of the Act which excluded from the purview of retrenchment employees employed on a fixed term basis.

By way of the amendment the legislature has excluded from the definition of retrenchment "the termination of the service of the workmen as a result of the non-renewal of the contract of employment between the employer and the workmen concerned on its expiry or such contract being terminated under the stipulation in that behalf contained in the contract of employment". There are two parts to this provision - the first part relates to the termination of the service of a workman as a result of non-renewal of the contract of employment between the employer and the workman concerned, on its expiry; and the second part refers to 'such contract' being terminated under the stipulation in that behalf, contained in the employment contract. Therefore, if the contract of employment stipulates the mode and the manner of termination of employment, such termination has now been specifically excluded from the ambit of the retrenchment defined under the Act.

The purpose behind amending the Act was to confer benefit to the seasonal industries as well as those industries which undertake passing phase projects & schemes since they require additional work force for specific/short duration. The purpose of introducing sub-clause (bb) in definition of retrenchment has been elucidated by the Hon'ble Supreme Court in S.M. Nilajkar vs. Telecom District Manager (AIR 2003 SC 3553). The Court observed that "It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for

such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer-State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting-in onerous obligations entailed upon it by extended application of the labour laws. Sub-clause (bb) in the definition of retrenchment was introduced to take care of such like-situations by Industrial Disputes (Amendment) Act, 1984 with effect from 18.8.1984".

The Hon'ble Supreme Court in S.M. Nilajkar (supra) came to the conclusion that the following conditions must be satisfied for the applicability of Sub-clause (bb) of Section 2(oo) that (i) the workmen is employed in a project or a scheme of temporary nature; (ii) the contract of employment provides inter-alia that the employment shall come to an end on expiry of the scheme or the project; (iii) the employment comes to an end with the termination of the scheme or project or on the expiry of the contract; and (iv) the workmen was apprised of the aforesaid terms by the employer at the commencement of the employment.

Since the benefit conferred on the employers by the above amended clause made the employer segment to valiantly and excitedly deploy labour on a fixed term basis, it led to misuse of the said provision and employers started hiring employees on fixed term basis instead of providing regular employment. Therefore, at this point of time, the judiciary was forced to reiterate the correct law in relation to the said provision.

With the increasing instances of misuse of the said amendment specifically in cases where the employment of the workmen employed on temporary basis was repeatedly renewed on artificial gaps of one or two days to ensure that provisions of retrenchment are not attracted to such employees, the Hon'ble Supreme Court took a strict view. The Supreme Court in Haryana State Electronics Corporation Ltd. vs. Mamni (2006 II LLJ 744 SC) upheld the conclusion reached by the High Court and observed that the intention of the management was not to engage the workmen for a specified period but was to defeat the rights available to the workmen under Section 25-F of the Industrial Disputes Act, 1947. The Supreme Court held that the High Court could not be said to have committed any illegality and that such a course of action was adopted by the employer with the view of defeat the object of the Act and therefore, Section 2(oo) (bb) was not attracted in the present case. In the said case a worker used to be engaged on 89 days and after completion of 89 days the contract was further renewed by leaving a gap of one or two days between each renewal.

Additionally, while interpreting the Sub-Clause (bb) the most essential factor on which the courts have laid emphasis is that the work to be carried out by the workmen ought to be of temporary nature or for a specific period. In this regard, attention must be drawn towards the decision of the Hon'ble Supreme Court in Mohindra Co-op Sugar Mills Ltd. vs. Ramesh Chandra Gouda (AIR 1996 SC 332). In the said case the sugar factory used to employ certain number of workmen during the crushing season only and at the end of the crushing season, their employment used to cease. The Supreme Court held that despite the fact that the workmen had worked for more than 240 days in a year (i.e. continuous service in a year), the cessation of their employment at the end of the crushing season would not amount to retrenchment, in view of the provision of Sub-clause (bb) of Section 2(oo) of the Act. A similar issue came before the Supreme Court in the Haryana State Agriculture Marketing Board vs. Subhash Chand (AIR 2006 SC 1263). In the said case the workman was appointed thrice on contract basis as an arrival records clerk. However, such appointment was made during the paddy season only and that too for a specific duration. After termination of his service the workman raised an industrial dispute. The Hon'ble Supreme Court noted the fact that appointments of the workman were made on contract basis. The court also noted that it was not a case where the workman is continuously appointed with artificial gaps of one or two days only as the gaps were of considerable periods. In view of the same, the court observed that the termination of the service of the workman does not amount to retrenchment under the Act since the same is covered under the exception contained in Sub-clause (bb) of Section 2(oo) of the Act.

Therefore, in view of the foregoing, where a workman is employed on fixed duration and the same is successively renewed on a gap of one or two days, then such practice on the part of the employer may be considered a camouflage for regular employment with a view to defeat the law and provisions regarding the termination of service of the workmen. HC